Hastings Law Journal

Volume 30 | Issue 6 Article 4

1-1979

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In modern constitutional law, limits on the commerce power are as rare as the phoenix.[1] Nonetheless, 1976 saw the Phoenix rise in a dispute over firefighters' wages. In *National League of Cities* v. *Usery*,[2] the Court held that application of the Fair Labor Standards Act to fire and police department employees violated states' rights under the tenth amendment. Because firefighters and police performed functions traditionally within the bailiwick of local government, congressional regulation of their wages and working conditions demeaned the sovereignty of the states.

It does demean a sovereign to be treated as any ordinary citizen. If the state must submit to federal regulation of the most basic activities it exists to perform, and if the commerce power is all embracing, the states remain sovereign only at the pleasure of the federal government. Sovereignty on these terms is a myth.[3]

National League of Cities v. Usery constitutionalized some minimum realm in which the state is sovereign. It is still the only Supreme Court decision invalidating a federal regulation as a violation of the tenth amendment. One commentator has concluded that it will remain the only one.[4] Professor Barber of Chicago has written that repeated efforts to enforce the tenth amendment, as in *League of Cities*, would

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1. "Until 1976, the conventional wisdom was that, since 1937, there have been no judicially enforceable limits on congressional power which derive from considerations of federalism. The sole protections for the states, it was said, were political." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 300 (1978). The relationship of interpretation of the tenth amendment to the scope of the commerce clause, the relationship of state and federal power, and the Court's role of arbiter were recently explored in Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161.

2. National League of Cities v. Usery, 426 U.S. 833 (1976).

3. One commentator discussing the conception of the all-embracing commerce clause concluded that "[t]he states have no guarantee of sovereignty under this conception of national power." Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161, 176.

4. *See* Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161.

inevitably lead the Court to a confrontation with Congress reminiscent of the New Deal. It was that confrontation that first prompted the Court to read the commerce clause with its modern expansive reach. To Professor Barber, *League of Cities* was merely a vestigial expression of states' rights philosophy.[5]

During the forty years since the New Deal, social control has inexorably consolidated in the expanding federal bureaucracy on the strength of the commerce power and the spending power. In the last twenty years, the Supreme Court has assumed an active role in supervising state misconduct under the Bill of Rights and Civil War amendments. The states have seemed destined to become mere administrators of federal programs and regulations, a convenience of the federal government much as municipal corporations are an administrative convenience of the states.[6]

Although *League of Cities* is uniqe in its tenth amendment holding, it is commonplace as an expression of the constitutional principles of federalism.[7] Principles of federalism restrain federal courts when

5. *Id.* at 176-82.

6. One hundred years ago, in a case involving a federal indictment of a state judge for acts done in his official capacity, Justice Field wrote: "The proceeding is a gross offense to the State: it is an attack upon her sovereignty in matters over which she has never surrendered her jurisdiction. The doctrine which sustains it, carried to its logical results, would degrade and sink her to the level of a mere local municipal corporation . . . ." *Ex parte* Virginia, 100 U.S. 339, 370 (1879) (Field, J., dissenting). *See also* Claybrooks v. State, 36 Md. App. 295, 307 n.7, 374 A.2d 365, 372 (1977): "The relationship that exists between the State and its municipalities on the one hand and the federal government and the States on the other is vastly different. Municipalities derive their authority and such sovereignty as they may have from the State. They are creatures of the State and if the State confers no authority upon them, they have none. The federal government is limited to the power vested in it by the States through the ratification of the Constitution. By the tenth amendment, the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Thus, the federal government also derives its power from the States. It has no more authority than the states have given it . . . ."

7. There is also a growing body of commentary, led by Professors Michelman and Tribe of Harvard, on the Court's decisions affecting the federal balance. A symposium on federalism issues, dedicated to Justice Brennan, who dissented in *National League of Cities v. Usery*, appears at 86 YALE L.J. 1015-1296 (1977). Both Michelman and Tribe suggest the Court is approaching the idea that states are constitutionally obligated to provide minimum governmental services. *See* Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 HARV. L. REV. 1065 (1977). Tribe summarized his own tenth amendment theory in his hornbook. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 300-319 (1978). For other discussions of federalism and the tenth amendment, see Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976); Note, *At Federalism's Cross-*

decreeing school desegregation or prison reform.[8] Principles of federalism have guided the development of the eleventh amendment prohibition against suing the state in federal court.[9] Justice Harlan's longstanding opposition to the "incorporation" of the Bill of Rights into the due process clause of the fourteenth amendment was based on

> the "essentially federal nature of our national government," . . . one of whose basic virtues is to leave ample room for governmental and social experimentation in a society as diverse as ours, and which also reflects the view of the Framers that "the security of liberty in America rested primarily upon the dispersion of governmental power across a federal system."[10]

The principles of federalism that lead the Court to restrain congressional action in *League of Cities* are rooted in the same concerns.

It is the thesis of this Article that a great deal of tenth amendment authority lies undiscovered in the Supreme Court reports. Many holdings never have been labelled as tenth amendment authority because of the assumption that the amendment merely states a truism.[11] Now, however, the amendment has surfaced and *League of Cities* is only the tip of a tenth amendment iceberg. The iceberg is not made of tenth amendment cases, but of eleventh amendment cases. For one hundred years, the Court has dealt with state sovereignty and the federal-state balance in the name of the eleventh amendment.

The Tip of the Iceberg

Two years before writing the plurality opinion in *League of Cities*, Justice Rehnquist wrote the majority opinion in *Edelman v. Jordan*,[12] holding that the eleventh amendment barred an award of damages against the state in federal court. Over the dissent of four justices, *Edelman* overruled portions of prior decisions that had awarded damages against the state, most notably *Shapiro v. Thompson*.[13] Two years later, in the 1976 decision, *Fitzpatrick v. Bitzer*,[14] Justice Rehnquist,

road's: National League of Cities v. Usery, 57 B.U.L. REV. 178 (1977); Note, *Municipal Bankruptcy, The Tenth Amendment and New Federalism*, 89 HARV. L. REV. 1871 (1976).

8. *See* Hutto v. Finney, 437 U.S. 678, 687 n.9 (1978); Milliken v. Bradley, 433 U.S. 267, 280-81 (1977).

9. *See* Hans v. Louisiana, 134 U.S. 1 (1890).

10. Williams v. Florida, 399 U.S. 78, 133 (1970) (Harlan, J., concurring) (quoting Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 285 (1970); Duncan v. Louisiana, 391 U.S. 145, 173 (1968)).

11. United States v. Darby, 312 U.S. 100, 124 (1941).

12. 415 U.S. 651 (1974).

13. 394 U.S. 618 (1969).

14. 427 U.S. 445 (1976).

with two concurrences but without dissent, refined *Edelman* by ruling that Congress could invade eleventh amendment immunity in exercise of the enforcement clause of the fourteenth amendment.[15]

Fitzpatrick was decided four days after *League of Cities* and cites that case for contrast:[16] Congress can invade the eleventh amendment to enforce the fourteenth, while Congress may not invade the tenth amendment in exercise of the commerce clause. Whether the citation to *League of Cities* was meant to contrast the nature of the tenth and eleventh amendments or was meant to contrast congressional power under the commerce clause and the fourteenth amendment is not revealed. In light of *Milliken v. Bradley*,[17] decided the following term, it was meant to do neither.

In *Milliken*, the state of Michigan had been ordered to pay half the cost of a remedial reading program to relieve the effects of segregation in Detroit schools. Michigan raised both tenth and eleventh amendment defenses to the court's jurisdiction and power to enter the decree. On the eleventh amendment issue, Chief Justice Burger, writing for the Court, cited *Edelman* and held that the decree did not award money damages, but granted only prospective equitable relief.[18] *Fitzpatrick* was not cited in the eleventh amendment portion of the decision. Instead, *Fitzpatrick*, and not *League of Cities*, was cited for the tenth amendment holding:

> [T]here is no merit to petitioners' claims that the relief ordered here violates the Tenth Amendment and general principles of federalism. The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment. *Cf. Fitzpatrick* v. *Bitzer*. . . . Nor are principles of federalism abrogated by the decree. The District Court has neither attempted to restructure local governmental entities nor to mandate a particular method or structure of state or local financing.[19]

It is peculiar that *Milliken* cites an eleventh amendment case in its discussion of the effect of the decree upon local government. Since at least 1890, the Supreme Court has held the eleventh amendment inapplicable to actions against local governments,[20] and a few months before *Milliken*, Mr. Justice Rehnquist reaffirmed that proposition for a

15. *Id.* at 456.
16. *Id.* at 453 n.9.
17. 433 U.S. 267 (1977).
18. *Id.* at 290 n.22.
19. *Id.* at 291.
20. Lincoln County v. Luning, 133 U.S. 529, 530-31 (1890).

unanimous Court.[21]

It is even more peculiar that *Milliken* cites *Fitzpatrick* for the proposition that a federal court can enforce the fourteenth amendment without implicating the tenth. In *Milliken*, there was no discussion of whether Congress had created an action aimed particularly at state defendants, although that fact was crucial in *Fitzpatrick*.[22]

If the Court in *Milliken* meant to add some explanation of its tenth amendment holding by a contrasting citation, *League of Cities* would have been more appropriate. *League of Cities* at least involved the tenth amendment. Also, like *Milliken*, it involved a federal intrusion into the state's manner of doing governmental business. In *League of Cities*, Mr. Justice Rehnquist reasoned that "[o]ne undoubted attribute of state sovereignty" was the power to control "functions essential to separate and independent existence."[23] The tenth amendment forbids Congress to significantly alter or displace the states' abilities to control its essential functions.[24] The Court mentioned "fire prevention, police protection, sanitation, public health, and parks and recreation" to be among these essential functions and concluded, "Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens."[25]

Threats to the "separate and independent existence" of the state and intrusions upon matters traditionally local should have been the concern of the Court in *Milliken* in applying the tenth amendment. Indeed, the Court in *Milliken* apparently assumed that education is also a traditional function of local government, but nevertheless permitted the intrusion because the tenth amendment was not implicated by enforcement of the fourteenth.

For the proposition that the enforcement clause of the fourteenth amendment is a special power in the federal arsenal, *Milliken* might have contrasted *League of Cities* and *Fitzpatrick*: Congress under the fourteenth amendment may tread where under the commerce clause it may not. However, that proposition is not very useful in *Milliken* where the Court, not Congress, encroached upon the state. *Fitzpatrick* unmistakably recognized congressional power to provide a remedy that the Court was powerless to impose.

The citation to *Fitzpatrick* may have been as authority for the

21. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81 (1977).
22. 427 U.S. at 456.
23. 426 U.S. at 845.
24. *Id.*
25. *Id.* at 851.

technique of decision making by *ipse dixit*. In *Fitzpatrick*, Mr. Justice Rehnquist had simply stated, "[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provision of section 5 of the Fourteenth Amendment."[26] In an equally conclusory fashion, the Court in *Milliken*, simply declared, "The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful State conduct enacted by the Fourteenth Amendment."[27] The Court offered no reason or authority for its conclusions in either case.

Although the holdings in both *Fitzpatrick* and *Milliken* are mere *ipse dixit*, it is unfair to charge the Court with elevating the technique to a recognized principle of decisionmaking. The Court had little guidance in history or precedent to help resolve the conflict between the eleventh amendment and congressional enforcement of the fourteenth amendment in *Fitzpatrick*. Ultimately, the question could turn on nothing other than the Supreme Court's opinion, consistent with its notions of federalism.

The Court confronted the same dilemma in *Milliken*. Is the minimal sovereignty constitutionally guaranteed to states invaded by a federally ordered remedial reading program? With no guidance and no way to avoid the issue, the Court could ultimately do no more than state its own opinion.

If these were cases of first impression the Court should have turned to basic principles and analogous problems for guidance. If these were not cases of first impression the Court should have cited and applied the controlling authority. However, the Court used neither technique. The Court merely stated its conclusion in each case. This defect in the Court's opinion-writing function may not necessarily imply a corresponding defect in the decisionmaking function. However, an overwhelming inference of the *ipse dixit* technique is that the decision was formulated at a subconscious level, bolstered by a sense of moral certitude, but not yet ripe for intellectual explanation. This may represent a problem both with discerning the governing principles as well as with defining the precise issues.

This section has been devoted to demonstrating the seeming confusion the Court suffers in the areas of the tenth and eleventh amendments. The Court refers to tenth and eleventh amendment cases

26. 427 U.S. at 456.
27. 433 U.S. at 291.

interchangeably, and for propositions unrelated to their respective holdings. Nonetheless, the Court does recognize questions of states' rights or federalism and is prepared to inquire whether constitutionally protected state sovereignty has been invaded.

Unfortunately, the Court has not articulated precisely what factors have influenced any given result. Instead, the Court summarily concludes that the tenth amendment, the eleventh amendment, the fourteenth amendment, "principles of federalism," or traditional notions of the essential functions of local government compel the decision. The results being compelled, however, are inconsistent with previous tenth and eleventh amendment law. The purpose of this Article is to identify the considerations that have influenced the Court in deciding particular cases. But, more important, the purpose of this Article is to identify the issues the Court actually confronts in a conflict over state and federal domain.

Eleventh Amendment Law

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[28]

The eleventh amendment is misleading without a discussion of eleventh amendment "law." As will become plain, the language of the amendment gives little indication of the meaning given it by the Court. The language refers to judicial power in the same terms as the constitutional grant of power in article III, section 2, clause 1, which provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity . . . between a State and Citizens of another State . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[29]

It would appear from the similarity of language that the eleventh amendment withdrew part of what article III conferred: jurisdiction of the federal courts. It is fundamental that subject matter jurisdiction cannot be conferred upon a federal court by consent of the parties.[30] It has always been held, however, that a state may consent to be sued in federal court despite the eleventh amendment.[31]

If the eleventh amendment is not a restriction of the federal judi-

28. U.S. CONST. amend. XI.
29. U.S. CONST. art. III, § 2, cl. 1.
30. Capron v. Van Noorden, 6 U.S. (2 Cranch) 125, 126 (1804).
31. *See* Annot., 50 L. Ed. 2d 928, 951-60 (1978).

cial power, what is it? In *Hans v. Louisiana*[32] the Court treated it as a canon of construction when interpreting article III. Emphasizing the amendment's language that federal judicial power *not be construed* to embrace suits by "citizens of another state" against a state, the court refused to *construe* article III to authorize suits against a state by its own citizens:

> Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.
>
> The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States.[33]

Although universally treated as an eleventh amendment case, *Hans v. Louisiana* was really an interpretation of article III and merely looked to the eleventh amendment for guidance. *Hans* also looked for guidance to Hamilton, writing in number eighty-one of *The Federalist*:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.[34]

Written before ratification of the Constitution, this passage of *The Federalist* suggested that no power had been conferred on the federal government to invade the immunity that the states enjoyed. Powers not delegated to the United States are reserved to the states and the people by the tenth amendment.[35]

In fact, the Court in *Hans* needed neither the eleventh nor tenth amendment to reach its result. While article III expressly granted and the eleventh amendment later withdrew jurisdiction to cases "between a state and citizens of another State," there had never been a grant of jurisdiction to cases between a state and its own citizens. *Hans* should

32. 134 U.S. 1 (1890).

33. *Id.* at 15.

34. THE FEDERALIST No. 81 (A. Hamilton), *quoted in* 134 U.S. at 13.

35. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

have been an easy case, a simple matter of reading article III to see if the grant of jurisdiction were there. Instead, the Court relied on an ill-defined tradition of state sovereignty as a canon of constitutional construction. Although there was no mention of the tenth amendment in *Hans*, the canon of construction was remembered by Mr. Justice Rehnquist when he dissented from the tenth amendment holding in *Fry v. United States*.[36] After discussing *Hans* and quoting from it at length, Justice Rehnquist observed:

> As it was not the Eleventh Amendment by its terms which justified the result in *Hans*, it is not the Tenth Amendment by its terms that prohibits congressional action which sets a mandatory ceiling on the wages of all state employees. Both Amendments are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects . . . .[37]

To Justice Rehnquist, the tenth and eleventh amendments are "examples" of state sovereignty explicitly provided for by the Constitution. They illustrate an understanding on behalf of the drafters that is useful in interpreting all of its provisions. The Constitution was intended to vest in the United States certain enumerated powers, and in all other respects the states remained sovereign.

Although the provisions of the Constitution should be *construed* so as to accommodate and preserve state sovereignty, the Constitution also imposes certain express prohibitions on the states. As to those matters the states have no sovereign interest to preserve or protect. Consistent with the idea that the states have no sovereign interests in those matters, the Court could declare in *Prout v. Starr*:[38]

> It would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the States, which forbid the States from entering into any treaty, alliance or confederation, from passing any bill of attainder, *ex post facto* law or law impairing the obligation of contracts, or without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other States, or from engaging in war,—all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations.[39]

36. 421 U.S. 542 (1975).
37. *Id.* at 557 (Rehnquist, J., dissenting).
38. 188 U.S. 537 (1903).
39. *Id.* at 543.

Although the eleventh amendment was meant to protect the sovereignty of the states, it does not immunize state conduct in matters where the states have yielded their sovereignty. As to those matters the state is not sovereign. It acts as any individual might act in violating the law and, as an individual, is liable to suit. Consistent with that notion, the Court had earlier declared in *Ex parte Virginia*[40] that "[t]he prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action . . . . Such enforcement is no invasion of State sovereignty."[41]

Ex parte Virginia also was not an eleventh amendment case. It involved a petition for habeas corpus by Judge J.D. Coles who had been arrested and indicted for excluding black citizens from jury service. According to Mr. Justice Strong, writing for the Court, the states had surrendered their sovereignty by virtue of section 5 of the fourteenth amendment. According to Mr. Justice Field, writing in dissent, the states still retained sovereignty which limited congressional power: "The new [federal] government being one of granted powers, its authority was limited by them and such as were necessarily implied for their execution. But lest, from a misconception of their extent, these powers might be abused, the Tenth Amendment was at an early day adopted . . . ."[42] Conceding that Congress was granted power to protect civil rights by the thirteenth amendment, Justice Field still thought that "it confers no political rights; it leaves the States free, as before its adoption, to determine who shall hold their offices and participate in the administration of their laws."[43] Therefore, Justice Field concluded that indictment of a state judge for acts done in his official capacity was unconstitutional.

> The proceeding is a gross offence to the State; it is an attack upon her sovereignty in matters over which she has never surrendered her jurisdiction. The doctrine which sustains it, carried to its logical results, would degrade and sink her to the level of a mere local municipal corporation.[44]

Only Justice Field mentioned the tenth amendment in *Ex parte Virginia*, but both the majority and dissent addressed the same issue: whether the states, in conferring power upon Congress to protect the rights of citizenship under the thirteenth and fourteenth amendments,

40. 100 U.S. 339 (1879).
41. *Id.* at 346.
42. *Id.* at 357 (Field, J., dissenting).
43. *Id.* at 363 (Field, J., dissenting).
44. *Id.* at 370 (Field, J. dissenting). See text accompanying note 6 *supra*.

had given Congress the power to invade the otherwise sovereign state realm of its administration of just laws.

From *Prout v. Starr* and *Ex parte Virginia*[45] emerges the principle that the state enjoys protection under the eleventh amendment only when acting in its sovereign capacity. A logical corollary to this principle is that when a state officer acts to enforce an unconstitutional state law, the state is not acting in its sovereign capacity and therefore enjoys no sovereign immunity that shields the state or its agents from liability. Much of the confusion with respect to modern eleventh amendment law can be traced to the fact that the Court in *Ex parte Young* failed to reach that conclusion.

In *Ex parte Young*, the lower court enjoined Attorney General Edward Young of Minnesota from enforcing an unconstitutional state law and committed him for contempt when he disobeyed the decree. Young raised an eleventh amendment objection, relying on *In re Ayers*[46] wherein the lower court had committed for contempt Attorney General Rufus Ayers of Virginia. Underlying the contempt in *Ayers* was a decree of specific performance of a contract to which the state was a party. *Ayers* held that a state officer could be sued for his individual wrongs, such as a trespass, but if the offense could only be committed by the state acting through its agent, then the agents could defend by asserting that the suit was really against the state and was barred by the eleventh amendment.

Following *Ayers, Ex parte Young* might have held that Young was acting as the agent of Minnesota when enforcing its laws and that the suit was really against the state. Such a conclusion would not mean, however, that the suit was automatically barred. According to *Prout v. Starr* and *Ex parte Virginia*, the states enjoy immunity only when acting constitutionally. If Minnesota were acting unconstitutionally it could be enjoined even when sued directly. The Court in *Ex parte Young* did remark that "the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity."[47] Although the state has no right to enforce an unconstitutional law, it unquestionably has the power to do so until confronted by a greater power preventing it. And when the State acts outside its sovereign powers it still acts through agents. Minnesota payed Young to enforce the law. To hold that Young was not

45. 209 U.S. 123 (1908).
46. 123 U.S. 443 (1887).
47. 209 U.S. at 159.

the agent of Minnesota when enforcing the statute is ridiculous. Would Minnesota be free to hire Green to enforce the statute after Young was enjoined? Could Minnesota then hire Black to enforce the statute after Green was enjoined? The point is, could a federal court enjoin Minnesota itself, or is the only relief against unconstitutional state action a hope of voluntary compliance. In the seventy years since *Ex parte Young*, the Court has yet to clearly answer these questions.[48]

Ex parte Young held that the Attorney General was not the agent of the state when acting to enforce an unconstitutional statute,[49] citing *In re Ayers*.[50] From *Ayers*, the Court in *Young* took the phrase that has since become the name of the rule in *Young*: "stripping doctrine." *In re Ayers* had stated:

> If . . . an individual, acting under the *assumed authority* of a State, as one of its officers, and under *color of its laws*, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.[51]

Ayers adopted a rule of stripping the state officer of his official capacity when he acted outside the scope of his authority. That is not the same as saying an officer acting within the scope of his authority ceases to be the agent of the state because the state action is unconstitutional. In *Ayers*, the official was stripped of his official immunity in circumstances where the state had no immunity to impart to him. The rationale in *Ayers* is much different from the rationale in *Young*, where the official was stripped of his official authority but the state remained immune. *Ayers* was based on constitutional law; *Young* was based on agency law. The agency principle was stated most clearly in the concurring opinion of Mr. Justice Field:

> To enjoin the officers of the Commonwealth, charged with the supervision and management of legal proceedings in her behalf, from bringing suits in her name, is nothing less than to enjoin the Commonwealth, for only by her officers can such suits be instituted and

48. Although the Supreme Court has never held that the order may be directly binding against the state, the Court will sustain a fine against the state for contempt if it does not obey: "If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance. The principles of federalism that inform Eleventh Amendment doctrine surely do not require federal courts to enforce their decrees only by sending high state officials to jail." Hutto v. Finney, 437 U.S. 678, 691 (1978) (footnote omitted).

49. 209 U.S. at 160.

50. 123 U.S. 443 (1887).

51. *Id.* at 507.

prosecuted. This seems to me an obvious conclusion.[52]

The conclusion was not obvious to the majority in *Ex parte Young*. Settled principles would have justified the result in *Young* without resort to the fiction that actual authority evaporated whenever the state action was unconstitutional. Why then did *Young* create an unnecessary and fictitious agency rule? The only reason the opinion offers is that the state, having no authority, could confer none upon an agent.[53] However, this obscures the point that a state having the power, could nevertheless confer that power upon its agent. The legacy of the agency rule in *Young* is a checkerboard of judicial remedies available to citizens injured by unconstitutional state conduct: officials may sometimes be enjoined, but damages cannot be recovered from the state.[54]

Ex parte Young and *Ex parte Virginia* have each figured prominently in Justice Rehnquist's analysis of eleventh amendment problems. As already noted, Justice Rehnquist cited *Hans v. Louisiana*[55] in his tenth amendment dissent in *Fry v. United States*.[56] In addition to the holdings and language of these cases, one passage from *In re Ayers* helps explain modern notions of federalism:

> The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons . . . .[57]

Although the passage names the eleventh amendment, it speaks of the "residuum of sovereignty" preserved by the tenth amendment. While the Court frequently mentions the eleventh amendment when reviewing a suit by a citizen against a state in federal court, behind the question of whether federal courts have jurisdiction is a more complex inquiry into the nature of the action and whether federal power intrudes upon the sovereign realm of the state.

Hans v. Louisiana did not involve the eleventh amendment at all. *Prout v. Starr* spoke of matters carved out of the states' sovereign realm. *Ex parte Virginia* was clearly a tenth amendment case. *In re Ayers* and *Ex parte Young*, nominally eleventh amendment cases, were

52. *Id.* at 508 (Field, J., concurring).
53. 209 U.S. at 160.
54. See text accompanying notes 62-67 *infra*.
55. 134 U.S. 1 (1890).
56. See text accompanying notes 36-37 *supra*.
57. 123 U.S. at 505.

identical upon their jurisdictional facts. Underlying both were suits by citizens against the attorney general of the state for equitable relief in federal court. The eleventh amendment barred the action in *Ayers* but not in *Young*.

The distinction lies only in the merits underlying each case. Minnesota acted unconstitutionally while Virginia acted constitutionally. Actions that successfully challenge unconstitutional state action do not intrude upon "that large residuum of sovereignty" preserved to the states.

Incorporating what were commonly regarded as eleventh amendment decisions, the amendment might have been restated as follows in 1908, the year of *Ex parte Young*:

> Jurisdiction of the Courts of the United States *shall not be exercised* in any suit in law or equity commenced or prosecuted by *Citizens of any state* against one of the United States *in its sovereign capacity without its consent.*

The italicized portions represent principles not expressed by the amendment as it is actually written. Certainly the most unwieldly concept is the notion of "sovereign capacity." That concept seems to belong more properly under the tenth amendment. It seeks to balance the reserved and delegated powers of the states and the United States so as to assure the integrity of the federal constitution against state iniquity without indiscriminately subjecting the state to suits by private citizens.

The constitutional source of "sovereign capacity" may seem irrelevant since the Court recognizes the concept without examining its pedigree. Its ancestry, however, may become important when the Court looks at the relationship of state and federal power. While the eleventh amendment refers only to judicial power, the tenth amendment limits Congress as well.

Between *Ex parte Young*,[58] in 1908, and *Edelman v. Jordan*,[59] in 1974, a number of cases reached the Supreme Court upon the issue of state consent to suit.[60] Through doctrines of implied consent, constructive consent, waiver, implied waiver, and finally, compelled waiver, the Court imposed its own notions of the circumstances in which a state should be amenable to suit even though no "consent" was ever expressed by the state. Apart from cases involving actual or implied in fact consent, the burdens of persuasion, presumptions, inferences, and

58. 209 U.S. 123 (1908).

59. 415 U.S. 651 (1974).

60. *See* Comment, *Implied Waiver of a State's Eleventh Amendment Immunity*, 1974 DUKE L.J. 925; Annot., 50 L. Ed. 2d 928 (1978).

miscellaneous rules of construing statutes and governmental activities derive from the Court's notions of which governmental functions, federal or state, are more important and from the Court's notions of the proper relationship of federal and state activity.

The entire body of consent "in law" rather than "in fact" and even the concept of consent itself is anathematic to all notions of limited federal jurisdiction. Consent is *the* prerogative of sovereignty in a democracy. Government in the United States exists only by the consent of the governed. The federal government was created by the consent of the states, by the states conferring certain enumerated sovereign powers upon the new federal entity. The states still retain the power to confer powers upon the federal government under article V by amending the federal constitution. If an individual state may expand the power of the federal government by consent, the ability to confer power by consent must be a power reserved to the states. Anytime the Court constructs "in law" a state consent prerequisite to federal action it tinkers with the very federal structure by adjusting the powers delegated to Congress or reserved to the states.

State consent to otherwise prohibited federal action is a tenth amendment issue. The fact that the federal action consented to in these cases is exercise of federal judicial power does not convert the problem into an eleventh amendment issue. What powers a state may confer by consent without use of the amendment machinery and whether the consent is constitutionally satisfactory in a given case are questions concerning the powers reserved to the state and are tenth amendment problems.[61]

61. In 1977, the Oregon Court of Appeals held that Oregon had title to the submersible lands underlying navigable waters by virtue of the sovereignty reserved by the tenth amendment. The court distinguished the state's *jus privatum* interest, the usual proprietary rights of private ownership, and the *jus publicum* interest, the overriding public interest in controlling navigable waters. The court then stated that *jus publicum* ownership carried a corresponding *obligation* to act on behalf of the public.

"The right of the public to use the waterways for [commerce, fishing and recreation] has always been recognized at common law. As representative of the people, the sovereign bears the responsibility to preserve these rights. Unlike the state's *jus privatum* interest, the *jus publicum* cannot be alienated. . . . In essence, the *jus publicum* is a nondelegable government obligation." Brusco Towboat Co. v. State, 30 Or. App. 509, 517-18, 567 P.2d 1037, 1043-44 (1977) (citations omitted). For a discussion of the theory that states are obligated to provide certain services, see the materials by Professors Michelman and Tribe cited in note 7 *supra*.

Can Congress legitimately regulate a matter traditionally reserved to the states, based upon state consent to the regulation, if the state's *jus publicum* interest is truly inalienable and nondelegable? A rule of inalienability under the tenth amendment would have a significant impact on the "consensual" regulation Congress imposes under the spending power.

Only one major eleventh amendment case not dealing with consent reached the Supreme Court between *Ex parte Young* and *Edelman v. Jordan*. In *Ford Motor Co. v. Department of Treasury*,[62] a citizen sued the state of Indiana for a tax refund. Relying on *In re Ayers*, the Court looked to "the essential nature and effect of the proceeding" to determine if the suit were really against the state. The Court treated one factor as conclusive of that issue: "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."[63] This rule is good common sense. However, the principle of agency law on which *Ford Motor Co.* relies is inconsistent with the rule of *Ex parte Young* that a state official's authority disintegrates whenever the state action is unconstitutional.

The Court in *Ford Motor Co.* blithely overlooked the inconsistency in *Ex parte Young*. In *Edelman v. Jordan*,[64] Mr. Justice Rehnquist wedded *Young* to *Ford Motor Co.* and concluded that the eleventh amendment permitted equitable relief but barred recovery of damages.[65] In *Ex parte Young* the Court had discussed the inadequacy of an action for damages in order to establish the propriety of the injunction it affirmed. *Ex parte Young* neither held nor hinted that damages were not recoverable. In fact, Justice Rehnquist never declared that *Young* stood for that proposition, nevertheless, by emphasizing that *Young* awarded equitable relief, Justice Rehnquist implies that damages were barred. At one point, Justice Rehnquist referred to "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young*."[66] Juxtaposition in that manner is either grossly inartful or intended to mislead and disguise the flaw in the authority.

Young is authority for the kind of relief permitted. The eleventh amendment is authority for the kind of relief barred. Through sentence structure, Justice Rehnquist implies that *Young* is authority for the kind of relief barred.

Even if a strict rule of inalienability were not adopted, the Supreme Court should consider the *jus publicum* obligation when confronted with assertions of implied and constructive state consent. The issue should be treated as an adjustment in the balance of federal and state power, the central tenth amendment concern.

62. 323 U.S. 459 (1945).
63. *Id.* at 464.
64. 415 U.S. 651 (1974).
65. *Id.* at 668-69.
66. *Id.* at 667.

Ford Motor Co. also was not authority for the result in *Edelman*. The rule announced in *Ford Motor Co.* concerning damages was intended to assist the Court when looking behind the nominal parties to discover whether the state was the real party in interest. The fact that the suit was actually against a state defendant in *Ford Motor Co.* did not dispose of the eleventh amendment issue. Although the Court went on to consider the issue of consent to suit, the Court should have continued and inquired whether the suit were against the state in its sovereign capacity. Mr. Justice Rehnquist did not cite *Ford Motor Co.* as authority for the result in *Edelman*. Instead, he declared, "Were we to uphold [the damage award], we would be obligated to overrule the Court's holding in *Ford Motor Co.*"[67] However, *Ford Motor Co.* did not hold that damage awards against the state were barred. Therefore, any overruling of *Ford Motor Co.* would have to be based upon some other issue.

Just because there was no authority for the result in *Edelman* does not make the case wrong. *Edelman*, like previous cases, read the eleventh amendment through the lens of history. With that prismatic perspective, Mr. Justice Rehnquist could read, "any suit in law or equity," to mean, "all suits in law or equity." Moreover, *Edelman* required state consent only for actions for damages; equitable relief could be granted over state protest.

In *Edelman*, Mr. Justice Rehnquist focused sharply on one issue—money damages. It was not important whether the money was awarded as legal or equitable relief; an attempt to characterize the damage award as equitable restitution was brushed aside as irrelevant. The important fact was that money would be awarded to remedy past shortcomings. To be sure, the prayer for damages in *Ford Motor Co.* had been the dispositive fact, convincing the Court that the state was the real party in interest. Even more pointedly, the Court had remarked in one of the consent cases, *Great Northern Life Insurance Co. v. Read*,[68] "[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."[69] The import of this statement goes beyond mere reference to the eleventh amendment.

67. *Id.* at 668.
68. 322 U.S. 47 (1944).
69. *Id.* at 54.

It seems to invoke the "principles of equity, comity and federalism"[70] that caution the Court to act with restraint when it decrees a course of remedial state action.

In the recent case of *Hutto v. Finney*,[71] attorney's fees had been awarded against the State Department of Corrections, to be paid out of Department funds, for bad faith noncompliance with court orders.[72] Citing *Edelman*, the Court held that the eleventh amendment counseled moderation in the amount of the award.[73] Much more important, however, the Court held that the "principles of federalism that inform Eleventh Amendment doctrine" gravitated toward the "less intrusive" remedy of a monetary award rather than sending state officials to jail.[74]

The Court's concern over damage awards against the state may emanate from the eleventh amendment but certainly is not limited to the scope of the amendment. The year before *Edelman*, the Court decided *Employees v. Department of Public Health and Welfare*,[75] an action brought by state employees against the state department of public health. The court held that implementation of congressional policy as set forth in the Fair Labor Standards Act did not divest a state of its sovereignty and allow it to be sued in federal court by its own citizens. The Act provided that the United States Secretary of Labor could bring suit to vindicate the rights of state employees. States are immune from attacks by their own citizens, but the Constitution does not bar a suit by the United States against a state.[76] The Court went on to note that while Congress might allow an employee to recover double damages against a private employer, Congress, in the interests of harmonious federalism, undoubtedly did not intend to allow an employee (citizen) to recover double damages against a state employer.[77] This same concern is expressed by the Court in *Hutto v. Finney* where an award against the state was proper under the eleventh amendment, but special considerations applied when the state treasury was endangered: "Although the Eleventh Amendment does not prohibit attorney's fees

70. *See* Mitchum v. Foster, 407 U.S. 225, 243 (1972); Younger v. Harris, 401 U.S. 37 (1971).

71. 437 U.S. 678 (1978).

72. The Court noted that it would have been better form to assess the award against the state officials rather than the Department but that this did not constitute reversible error. *Id.* at 692-93.

73. *Id.* at 692 n.18.

74. *Id.* at 691.

75. 411 U.S. 279 (1973).

76. *Id.* at 285-86.

77. *Id.* at 286.

awards for bad faith, it may counsel moderation in determining the size of the award or in giving the State time to adjust its budget before paying the full amount of the fee."[78]

Federalism was the concern in *Employees*. Federalism was probably the real concern underlying *Great Northern Life* and *Edelman*. Whether Congress could regulate the salaries of state employees was the tenth amendment problem before the Court in *Fry v. United States* and *National League of Cities v. Usery*. In *League of Cities*, Mr. Justice Blackmun had concurred upon principles of federalism, with no effort to derive those principles from any specific constitutional provision.[79] In *Hutto v. Finney*, the Court vaguely referred to "[t]he principles of federalism that inform Eleventh Amendment doctrine."[80] In *Milliken v. Bradley*,[81] which decreed that the state share the cost of a remedial educational program, the Court distinguished that kind of fiscal intrusion from the damage award sought in *Edelman*: "In contrast to *Edelman*, there was no money award here in favor of respondent Bradley or any member of his class. This case simply does not involve individual citizens conducting a raid on the state treasury."[82] Money is not the true concern in *Milliken*; the true concern is whose rights are at stake. Bradley was not acting to vindicate only his own rights. The decree he sought would enforce the fourteenth amendment for the benefit of the entire Detroit community. This formulation is essentially a private attorney general theory, a familiar device in the Supreme Court. In 1968, the Court had declared:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.[83]

In distinguishing injunctive relief from damages, the Court in *Edelman* quoted from an appellate decision:

> It is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to

78. 437 U.S. at 692 n.18.
79. 426 U.S. at 856 (Blackmun, J., concurring).
80. 437 U.S. at 691.
81. 433 U.S. 267 (1977).
82. *Id.* at 290 n.22.
83. Newman v. Piggie Park Enterprises, 390 U.S. 400, 401-02 (1968). *See also* Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

> have the benefit of federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past.[84]

Injunctive relief is measured by the federal standards involved, while damages are measured by the invasion of private rights involved. The Court seems to treat enforcement of federal standards as a suit brought by the United States under a private attorney general theory, while holding that damages for the individual wrongs do not fall within the private attorney general theory and are therefore suits brought by citizens, barred by the eleventh amendment. States must consent to suits otherwise within the eleventh amendment. The Court permitted the injunctive relief in *Edelman* despite its finding that the state had not consented. Nonetheless, because the damage action required state consent, it was barred. It is worth repeating the language distinguishing *Edelman* in *Milliken v. Bradley*: "In contrast to *Edelman*, there was no money award here in favor of respondent Bradley or any member" of his class. This case simply does not involve individual citizens' conducting a raid on the state treasury for an accrued monetary liability."[85]

These results suggest that the Court has adopted a rule permitting it to look behind the nominal plaintiff to determine the real party in interest for the purpose of the eleventh amendment, much as it looks behind the nominal defendant to determine if the state is the real party in interest. Just as a state officer who is not sued on behalf of his state employer may be "stripped" of his official immunity, so a private citizen who sues on behalf of the United States may be "clothed" with its standing to sue.

As previously suggested, the lack of authority for the result in *Edelman* does not make the case necessarily wrong. A private attorney general theory that distinguishes the public and private elements of an action makes *Edelman nearly* right. Moreover, a private attorney general theory helps explain why concerns over federalism so frequently arise when damages are sought against the state. Damages may sometimes be an appropriate remedy to enforce the public rights. In *Fitzpatrick v. Bitzer*,[86] the Court held that Congress could, "for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States."[87] These private suits may be created both

84. 415 U.S. at 665 (quoting Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), *cert denied*, 411 U.S. 921 (1973)).

85. 433 U.S. at 290.

86. 427 U.S. 445 (1976).

87. *Id.* at 456.

for the purpose of redressing private rights and for assuring state compliance with constitutional obligations. Although individual civil rights are involved, the federal government is charged with protecting them. When treated as a remedy imposed for the purpose of assuring future compliance, damages measured by past wrongdoing are in a sense punitive. Although the damages compensate the injured citizen, they do not compensate the United States, the real party in interest. Thus, in *Employees* the double damages against the state, provided for in a federal statute, were not allowed because they were inconsistent with "harmonious federalism," even though the eleventh amendment did not prohibit them. Yet, the Court, particularly in *Bivens v. Six Unknown Named Agents*,[88] has recognized that recovery of damages measured by the private injury can be an effective tool for enforcing constitutional provisions by providing a disincentive for government violations while offering an incentive for private policing. In the enforcement scheme, the litigant acts as a private attorney general on behalf of the United States even when seeking private damages.[89]

Perhaps the particular circumstances in *Edelman* compelled the proper result. In that case damages may not have been necessary to assure compliance with federal law. In other circumstances, damages may be the necessary remedy. Congress decided that damages were appropriate under Title VII of the Civil Rights Act of 1964, and the Court enforced that decision in *Fitzpatrick*. When the Court recognizes its own power to enforce the Constitution, especially in institutionalized areas such as schools or prisons where nearly any relief orders a state how to spend its money, the Court should not be inhibited in fashioning the proper remedy by a rule prohibiting damages.[90] The true test of whether damages are a proper remedy should be built upon "principles of equity, comity and federalism."[91]

Edelman is a sound eleventh amendment case if a private attorney

88. 403 U.S. 388 (1971).

89. *See* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

90. In a school desegregation case, the Court remarked: "That the programs are also 'compensatory' in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment." Milliken v. Bradley, 433 U.S. 267, 290 (1977), wherein attorneys' fees were awarded against the state officials for bad faith noncompliance with court orders. The Court remarked: "That the award had a compensatory effect does not in any event distinguish it from a fine for civil contempt, which also compensates a private party for the consequences of a contemnor's disobedience." Hutto v. Finney, 437 U.S. 678, 691-92 n.17 (1978).

91. Mitchum v. Foster, 407 U.S. 225, 243 (1972).

general theory is applied, but it also inadvertently disposed of a tenth amendment issue. Under a private attorney general theory the action for an injunction to enforce federal law is a suit by the United States and is therefore outside the eleventh amendment constraints; the action for damages is a suit by private citizens against the state, the real party in interest, and is barred by the eleventh amendment. Yet, in a proper case, damages should be awarded against the state in an action by the United States, when necessary to assure compliance with federal standards and when consistent with principles of comity, equity, and federalism. *Edelman* explicitly decided that damages were not appropriate in the private action. *Edelman* also impliedly decided that damages were inappropriate in the public action to protect the rights of the United States. Deciding whether the United States is the real plaintiff in interest, enabling a court to entertain the suit at all, is an eleventh amendment issue. Once it is decided that the United States is the real plaintiff in interest, determining whether damages may be awarded is a tenth amendment issue.

The Court would have done well to distinguish the tenth amendment issue in *Edelman*. Two years later *Fitzpatrick v. Bitzer*,[92] an action against a state under Title VII of the Civil Rights Act of 1964, reached the Court. Acting under section 5 of the fourteenth amendment, Congress had previously amended Title VII to specifically provide for damage actions against states. The Court held that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans v. Louisiana* . . . , are necessarily limited by the enforcement provisions of section 5 of the Fourteenth Amendment."[93]

Clearly, the Supreme Court has stated that "Congress has plenary power to set aside the State's immunity from retroactive relief in order to enforce the Fourteenth Amendment."[94] It was unnecessary for the Court to decide that Congress could create a private damage action despite the eleventh amendment, when the Court could have decided that provision for damages was a necessary and proper exercise of congressional power consistent with notions of harmonious federalism under the tenth amendment. Indeed, the tenth amendment issue remains unresolved.

Under a private attorney general theory, there is no eleventh

92. 427 U.S. 445 (1976).

93. *Id.* at 456.

94. Hutto v. Finney, 437 U.S. 678, 693 (1978) (explaining Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)).

amendment issue in *Fitzpatrick*. There is only the tenth amendment issue: whether awarding damages is consistent with "harmonious federalism." If the private litigant is not acting as an attorney general to enforce constitutional obligations against the state, it is really not any business of Congress to provide a forum for private disputes, as Congress apparently has after *Fitzpatrick*. Outside the constitutional arena, it is no concern of Congress how states deal with their own citizens. The judicial power of the United States has never covered suits against states by their own citizens. If the states are truly sovereign, they may give or withhold relief according to their sovereign whim.

This power is not as harsh as it sounds, for if democracy works, the sovereign whim is controlled by popular vote, and each state has its own constitution and courts to check excessive majoritarian caprice. Moreover, when the judicial power of the United States was construed to cover suits against states by citizens of other states the eleventh amendment promptly removed that power. It arguably might be a national concern how states treat nonresidents, but Congress should not demand that nonresidents be treated better than residents. There are sufficient safeguards of equal treatment in the full faith and credit clause, privileges and immunities clause, equal protection clause, and principles of comity. *National League of Cities v. Usery*[95] held that the tenth amendment preserved state sovereignty in "functions essential to separate and independent existence."[96] Nothing is more fundamental, more essential to the states' separate and independent existence than control of state government by its own citizens. The most basic tenet of democratic government is that the governed choose how they will be ruled. If the United States, the voice of the people of fifty states, is permitted to tell Ohio or California what it must do with respect to its own citizens, the people of Ohio or California become a minority in their own state government.

The real issue in *Fitzpatrick* was not the eleventh amendment. The real issue was whether awarding damages to private litigants who enforced the Constitution against a state was consistent with the tenth amendment. A congressional declaration that damages are appropriate is entitled to some deference by the Court, but it is not crucial that Congress make the declaration. The Court recognizes its own power to mold remedies to enforce the fourteenth amendment. Not surprisingly, the Court held in *Milliken v. Bradley* that "The Tenth Amendment's

95. 426 U.S. 833 (1976).

96. *Id.* at 845 (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911); Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869)).

reservation of nondelegated powers to the States is not implicated by a federal court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment. Cf. *Fitzpatrick v. Bitzer*."[97] By the fourteenth amendment the states delegated new powers to the United States. Exercise of those powers, whether by Congress or the Court, does not overlap powers reserved to the states. Yet exercise of fourteenth amendment power may still violate the tenth amendment if it sweeps more broadly than necessary or unduly penetrates the remaining state sovereignty.

If a *Restatement Second* of the eleventh amendment were attempted in 1979, according to the cases that have cited the amendment in their holdings, it might read:

> Jurisdiction of the Courts of the United States shall not be exercised in any suit in law commenced or prosecuted by Citizens of any State against one of the United States in its sovereign capacity without its consent, nor in any suit in equity upon rights not arising under the Constitution and laws of the United States; provided, however, that suits in equity arising under the Constitution and laws of the United States may be entertained regardless of State consent; and provided further that nothing herein shall limit the power of Congress to enforce the Fourteenth Amendment.[98]

The discussion of the eleventh amendment case law should make clear that the amendment has become unnecessarily complicated. The major reason for the complication is the grafting of tenth amendment principles onto the original eleventh amendment stock.

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97. 433 U.S. at 291.

98. The eleventh amendment has inspired a wide range of viewpoints in the law reviews. In 1975, a student note, after presenting a thorough history culminating with *Edelman*, concluded despairingly and rather abruptly that the amendment should be repealed. Note, *Constitutional Law—The Eleventh Amendment—Injustice For All*, 77 W. VA. L. REV. 724 (1975). The same year, another commentator concluded that the *Edelman* interpretation was correct, Congress had the power to subject the states to federal jurisdiction. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975). After the Court's decision in *Fitzpatrick*, Judge Weick of the United States Court of Appeals for the Sixth Circuit wrote that in the effort to reconcile state sovereignty with the supremacy of federal law, the state's immunity had worn dangerously thin. He concluded that citizens should not look to 42 U.S.C. § 1983, but to state law for remedies against the state, even for constitutional violations. Weick, *Erosion of State Sovereign Immunity and the Eleventh Amendment by Federal Decisional Law*, 10 AKRON L. REV. 583 (1977). The most ambitious attempt to make sense of the amendment was written by a clerk to the Chief Judge of the United States Court of Appeals for the First Circuit, who identified three conceptions of the amendment—the jurisdictional model, sovereign immunity, and individual rights—that at various times predominated, along with an undercurrent of federalism. The author concluded that a balancing test should be adopted with preservation of federalism the goal. Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139 (1977).

Tenth Amendment Law

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[99]

As it would be misleading to quote the eleventh amendment without discussing the cases traditionally said to have interpreted it, so it is equally misleading to quote the tenth amendment before discussing the lack of cases interpreting it. Prior to 1975, tenth amendment case law had deduced that "[t]he amendment states but a truism that all is retained which has not been surrendered."[100] In 1975, the Court stated that "[t]he Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[101] In *Fry v. United States*, the Court held that federal control over the wages of state employees under the Economic Stabilization Act did not so impair the states' integrity or ability to function as to violate the tenth amendment. Mr. Justice Rehnquist dissented, relying on *Hans v. Louisiana* and recognizing that *Hans* was not an eleventh amendment case. In 1976, Mr. Justice Rehnquist wrote for the Court in *National League of Cities v. Usery*[102] that the Fair Labor Standards Act as applied to state employees impaired the states' "separate and independent existence"[103] and violated the tenth amendment. In 1977, the Court, relying on *Fitzpatrick v. Bitzer*, ostensibly an eleventh amendment case, held in *Milliken v. Bradley*[104] that a decree ordering Michigan to bear part of the cost of a remedial reading program in Detroit did not violate the tenth amendment. *Fry, League of Cities*, and *Milliken* are the entire body of recognized tenth amendment law. Throughout the preceding examination, however, a great many tenth amendment principles were revealed among ostensibly eleventh amendment cases. The principle of state sovereignty discussed in *Prout v. Starr*[105] and *Ex parte Virginia*[106] was an effort to accommodate the powers yielded with the powers retained by the states. Mr. Justice Field, dissenting in *Ex parte Virginia*, acknowledged that the case presented a tenth amendment

99. U.S. CONST. amend. X.
100. United States v. Darby, 312 U.S. 100, 124 (1941).
101. Fry v. United States, 421 U.S. 542, 547 n.7 (1975).
102. 426 U.S. 833 (1976).
103. *Id.* at 845 (quoting Coyle v. Oklahoma 221 U.S. 559, 580 (1911); Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869)).
104. 433 U.S. 267, 291 (1977).
105. 188 U.S. 537 (1903).
106. 100 U.S. 339 (1879).

issue.[107]

State consent to suit is also an effort to accommodate federal and state powers. The consent doctrine implies that federal courts have subject matter jurisdiction which cannot be conferred by consent. Consent is more than an element of a cause of action or a prerequisite to personal jurisdiction. Consent is a conferral of power by the states, or an accession to power by the United States, the very heart of the tenth amendment. The distinction between equitable relief and damages, while useful to determine the real party in interest with respect to both defendant and plaintiff, also presents a tenth amendment issue concerning the nature of federal intrusion into state affairs even when the United States is otherwise justified to intrude.

State sovereignty, consent to suit, and the kind of relief sought are appropriate subjects of inquiry when a state is brought before a federal court to answer a citizen's complaint. State sovereignty, consent to federal intrusion, and the kind of intrusion attempted are equally appropriate subjects of inquiry when Congress acts to regulate or control.

Treating these matters as tenth amendment issues, however, does not mean that eleventh amendment case law can serve as precedent for future tenth amendment results. There is no examination, or even mention, of the principles of sovereignty, federalism, the nature of federal power, or the necessity or superfluity of a damage remedy in *Edelman*. Even Justice Rehnquist, the author of that opinion, later remarked, "Surely there can be no more fundamental constitutional question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments."[108]

In modern eleventh amendment cases, the Court neglects to explain why a state is sometimes immune and other times is not. The common explanation is that the eleventh amendment compels the result, although unannounced notions of federalism plainly color the results. Notions of federalism have a place in these cases, but they must be openly presented and discussed.

Notions of Federalism

Under the eleventh amendment the state is immune from suit only if three jurisdictional facts are established: 1) the state must be the defendant; 2) a citizen must be the plaintiff; and 3) the state must not have

107. *Id.* at 353-58 (Field, J., dissenting).
108. Edelman v. Jordan, 421 U.S. 542, 559 (1975) (Rehnquist, J., dissenting).

consented to be sued. Notions of federalism operate to soften or adjust these jurisdictional facts, but they remain the ultimate facts upon which the results rest. Even the distinction between equitable relief and damages began as a means to determine whether the state was the real defendant in interest. Because eleventh amendment cases purport to look only for certain jurisdictional facts, they exclude a multitude of factors that should be relevant to tenth amendment problems. For that reason, eleventh amendment cases cannot simply be recategorized as tenth amendment cases and serve as meaningful precedent. Nonetheless, many tenth and eleventh amendment principles can be identified.

Eleventh Amendment Principles

When a private citizen sues a state in its sovereign capacity the action is barred in federal court. The only exception to this rule is that a state may consent to suit. Even though consent is a jurisdictional fact under the eleventh amendment, questions of implied, constructive, or coerced consent must be determined according to tenth amendment principles with due regard for the sovereignty of the state and the proper reach of federal power.[109]

When any of the three jurisdictional facts is absent the eleventh amendment does not apply. The eleventh amendment is implicated only when a private citizen is the real party in interest. Determining the real party plaintiff includes use of the "clothing doctrine," the private attorney general theory under which the United States may be the real party in interest despite the normal private plaintiff.[110]

Similarly, a state may or may not be a nominal defendant. Whether the state is the real party in interest may be determined by whether a damage award will be satisfied from the state treasury or whether equitable relief will impinge upon state functions.[111] The "stripping doctrine" is unsound as a law of the real party in interest and unprincipled as a law of agency and could be discarded in favor of a rule based on state sovereign capacity.[112]

109. See text accompanying notes 60-61 *supra.*

110. See text accompanying notes 77-91 *supra.*

111. See text accompanying notes 62-67 *supra.*

112. The Supreme Court recently was asked to overrule *Ex parte Young* but declined to do so in Ray v. Atlantic Richfield Co., 435 U.S. 151, 156-57 n.6 (1978): "The state defendants challenged the District Court's jurisdiction over them, asserting sovereign immunity under the Eleventh Amendment. They recognized that in *Ex parte Young* . . . , the Court held that the Eleventh Amendment does not bar suit in federal court against a state official for the purpose of obtaining an injunction against his enforcement of a state law alleged to be unconstitutional, but urged the District Court to overrule that decision or to restrict its

When the state is the real party defendant, suit may still be proper when the state does not act in its sovereign capacity that is, when the state acts without legitimate power.[113] A state violates the United States Constitution when it exercises power that it has yielded to the federal government. The sovereign consists of only the things of which it is constituted. While the sovereign cannot violate the Constitution, an aggregate of persons, acting in concert and entrusted with the state's machinery of government, can. That aggregate of persons, even when labelled the state, does not enjoy the sovereign immunity of the eleventh amendment. Defining the sovereignty of the state is a tenth amendment issue. However, there is a discrepancy between the concept of sovereignty as it has evolved in eleventh amendment cases and the concept of sovereignty found in *Fry v. United States* and *National League of Cities v. Usery* ("functions essential to separate and independent existence").[114] These definitions of sovereignty must be reconciled in future decisions.

Tenth Amendment Principles

Congress may not "wield its power in a fashion that would impair the States' 'ability to function effectively in a federal system.'"[115] However, a state may be free to consent to otherwise permissible uses of federal power. Speaking for the majority in *League of Cities*, Justice Rehnquist suggested: "We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment."[116] Use of conditional grants of money under the spending power may permit Congress to regulate in ways

application. The District Court declined to do so. The request is repeated here, and we reject it." Note that the Court characterized *Young* by its result, not by its rationale. As suggested in the text, the result is proper, only the rationale should be discarded. The interpretation of *Young* in *Ray v. Atlantic Richfield Co.* suggests that perhaps the Court has already discarded the rationale, *sub silentio*. Certainly the Court no longer subscribes to the fiction created by *Young*: "Although the Eleventh Amendment prevented respondents from suing the State by name, their injunctive suit against prison officials was, for all practical purposes, brought against the State." Hutto v. Finney 437 U.S. 678, 699 (1978). However, the Court still demands observance of the formality that the State not be named, and will dismiss the State if named. Alabama v. Pugh, 98 S. Ct. 3057 (1978).

113. See text accompanying notes 39-52 *supra*.

114. National League of Cities v. Usery, 426 U.S. 833, 845 (1976) (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911); Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869)).

115. *Id.* at 852 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).

116. *Id.* at 852 n.17.

that would otherwise offend the tenth amendment. The fourteenth amendment, unlike Congress' enumerated powers in article I, acts expressly as a check on state action and therefore may warrant greater intrusion upon state sovereignty. The same principle applies to other constitutional limitations on state action, such as the *ex post facto* and bill of attainder provisions.[117] The definition of state sovereignty is based on the function of state government. Sovereignty consists of those powers reserved to the states by the tenth amendment's terms, those "not delegated to the United States." Admittedly, the language of the tenth amendment does not offer much guidance. The court has discarded the distinction between proprietary and governmental functions as not especially helpful when defining the sovereign realm.[118] In eleventh amendment cases, state sovereignty covered all constitutional acts of a state; in tenth amendment cases, sovereignty meant "functions essential to the separate and independent existence" of the state. These two definitions are not necessarily incompatible. While the definition of sovereignty under the eleventh amendment may embrace the entire scope of state activity and be appropriate to determining when suit may be brought by a private litigant in federal court, the tenth amendment definition may, consistently, identify the core of the state sovereign realm where an intrusion can be so disruptive that the Court feels justified in interposing its judgment for that of Congress. Probably lying somewhere in between these definitions is the conception of state sovereignty the Court uses when reviewing judicial decrees to assure that they comport with principles of comity, equity, and federalism.

Two factors distinguish these three definitions: whether the Court itself is balancing the federal-state relationship or is reviewing the balance struck by a coordinate branch of government; and whether sovereignty is conceived as a right of the state or as a limit on the federal government. The first distinction is a common one in constitutional law. When the judgment of a coordinate branch of government is involved, the Court defers unless the particular rights at stake are of such magnitude that careful, individualized scrutiny is required. The second distinction has found some discussion in tenth amendment cases. Under the eleventh amendment, sovereignty is treated as a state right. Under the tenth amendment, sovereignty has been considered a limit on federal power. Mr. Justice Rehnquist examined this comparison by

117. See text accompanying notes 39-41 *supra*.

118. *See* National League of Cities v. Usery, 426 U.S. 833, 854-55 (1976). *But see* Fry v. United States, 421 U.S. 542, 558 n.2 (1975) (Rehnquist, J., dissenting).

analogy to individual rights in his dissent to *Fry v. United States*:[119]

> [A]n individual who attacks an Act of Congress on the ground that it is not within congressional authority under the Commerce Clause asserts only a claim of lack of legislative power . . . . [T]his individual's claim is ordinarily very difficult to sustain. But an individual who attacks an Act of Congress, justified under the Commerce Clause, on the ground that it infringes his rights under, say, the First and Fifth Amendment, is asserting an affirmative constitutional defense of his own, one which can limit the exercise of power which is otherwise expressly delegated to Congress.[120]

In Mr. Justice Rehnquist's opinion, the tenth amendment is a state's "affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority."[121]

The difference between a limitation and a right could be very meaningful. If Congress cannot regulate the wages a state pays its firefighters simply because the commerce power does not justify it, then Congress could not regulate a private company providing fire protection services. This interpretation, however, is inconsistent with present case law under the commerce clause.[122] On the other hand, if Congress could not regulate firefighters' wages becase of the states' affirmative right to be free of interference, it could nevertheless regulate a private enterprise conducting the same business.

Conceived as a matter of states' rights, the tenth amendment definition of state sovereignty may be similar to the eleventh amendment definition, embracing anything a state constitutionally may do. It is a state's province to provide fire protection. It is Congress' province to regulate interstate commerce. The wages of firefighters fall within each province. The state may expect Congress to defer to traditional state sovereignty if Congress has an alternate means to achieve its purpose. If Congress can achieve its purpose only by regulating firefighters' wages, the Court should still determine if the intrusion is warranted. The Court should examine the importance of the federal objective and the increment toward that objective that the regulation adds, alongside the intrusion upon the state activity or interest being invaded. When the state activity or interest invaded is fundamental to the state's existence, a compelling justification should be demanded for any invasion. Even then, the state can demand that any available, less intrusive means to the federal objective be employed.

119. 421 U.S. 542 (1975).
120. *Id.* at 552-53 (Rehnquist, J., dissenting).
121. *Id.* at 553.
122. See text accompanying note 1 *supra*.

Principles of comity, equity, and federalism require that the federal government intrude no more than is necessary,[123] even when the federal government is otherwise permitted to intrude under the tenth amendment. In determining whether the intrusion is properly limited, the Court is especially reluctant to give effect to statutes or decrees that dip into the state treasury.[124]

The Base of the Iceberg

The most significant effect of redefining eleventh amendment law as tenth amendment law is the change in the basic analytical approach. The artificial question of the existence of power may be discarded in favor of the more realistic question of the balance of power. The problem becomes a mixed factual and legal issue—whether upon the facts of the case, Congress or the Court should act, and in what manner, consistent with the notions of federalism embodied in the Constitution. To test whether the new definitions of the tenth and eleventh amendments may offer more guidance for future decisionmaking, consider the facts and holdings of two recent state court cases.

In 1976, the Supreme Court of Ohio, without dissent, held that the eleventh amendment bars a suit on a federal cause of action by a citizen against a state *in a state court*. Nelson Souder, a retarded man, had been involuntarily committed to Orient State Institute at age fifteen, and for the next thirty-three years worked in the kitchen twelve and one-half hours a day, two days off per month, for the sum of two dollars a month. In an action to which the state was not a party, Souder obtained a declaratory judgment in federal court that federal minimum wage standards applied. Then Souder sought to enforce the decree against the state in state court. The trial court dismissed the action because of sovereign immunity and the case reached the Ohio Supreme Court as *Mossman v. Donahey*.[125] After carefully considering all the major United States Supreme Court precedent, Justice Stern held: "[U]nder the line of cases deriving from *Hans v. Louisiana* . . . it is our conclusion that state sovereign immunity applies equally to state as well as federal courts . . . ."[126] *Mossman v. Donahey* was decided two months before *National League of Cities v. Usery*, yet reached a similar result based on eleventh amendment case law. In his concurring opinion in *Mossman*, Justice William Brown recognized that the case really

123. Hutto v. Finney, 437 U.S. 678, 691 (1978).
124. See text accompanying notes 69-82 *supra*.
125. 46 Ohio St. 2d 1, 346 N.E.2d 305 (1976).
126. *Id.* at 18, 346 N.E.2d at 315.

presented a tenth amendment issue. Joining with the majority, "to protest what constitutes, in my opinion, an incredible federal intrusion into internal state affairs,"[127] Justice Brown cited the dissent by Mr. Justice Rehnquist in *Fry* and stated:

> The situation herein presented is neither a federal program being administered by the states nor a state program greatly dependent upon the federal fisc. Rather, it is a state activity like the administration of prisons, which *historically* has been an *exclusive state function* under the reserved powers of the Tenth Amendment.[128]

The real question in *Mossman* was the relationship of state and federal power. Instead of addressing the issue directly, the court erected an absurd construction of the eleventh amendment. The court, however, had no tenth amendment principles to guide it and focused upon what seemed relevant language from the eleventh amendment cases. If the court had understood the eleventh amendment cases as announcing principles for adjusting the relationship of state and federal powers, it should have conducted a more pointed inquiry into the facts of the case: the severity of the intrusion into the state's sovereign realm and the importance of the federal purpose involved.

In early 1977, the Supreme Court of Nevada heard *State v. Rosenthal*.[129] Rosenthal had been denied a state gaming license as a person who "would reflect or tend to reflect discredit upon the State of Nevada."[130] Rosenthal asserted that because the standards for making that determination were vague and the decision was arbitrary and capricious, the gaming commission had violated his due process rights. Instead of considering the due process contention, the court held that the due process clause did not apply:

> We view gaming as a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution . . . . Within this context we find no room for federally protected constitutional rights. This distinctively state problem is to be governed, controlled and regulated by the state legislature and, to the extent the legislature decrees, by the Nevada Constitution. It is apparent that if we were to recognize federal protections of this wholly privileged state enterprise, necessary state control would be substantially diminished and federal intrusion invited.[131]

It is one thing to say the due process clause is satisfied with very minimal procedural safeguards or statutory specificity, but it seems incredible that any court, in 1977, could hold that the due process clause does

127. *Id.* at 18-19, 346 N.E.2d at 315 (Brown, J., concurring).
128. *Id.* at 19-20, 346 N.E.2d at 316 (Brown, J., concurring).
129. 93 Nev. 36, 559 P.2d 830, *appeal dismissed*, 434 U.S. 803 (1977).
130. *Id.* at 40, 559 P.2d at 833.
131. *Id.* at 44-45, 559 P.2d at 836.

not apply to any state hearing. Regulation of gambling, like the control of the sale and use of alcohol, has traditionally been a responsibility of the state. However, despite the mandate of the twenty-first amendment, the United States Supreme Court has held that the fourteenth amendment still applies to state action in that area. In *Craig v. Boren*,[132] the Supreme Court remarked at length on the distinction between economic regulation under the commerce clause and protection of individual rights under the due process clause. Thus, even though control of alcoholic beverages is expressly made a local concern by the Constitution, the Court noted that "[n]either the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned."[133]

The Supreme Court of Nevada may have been right that the tenth amendment prevents the federal government from poaching on the state's gaming preserve by prescribing what procedures must be employed. It is quite another matter, however, to say that whatever action the state chooses to take may encroach upon individual liberty. The tenth amendment regulates state-citizen relations. While the tenth amendment may act as a check on the power of the federal government to enforce the fourteenth amendment, the tenth amendment certainly does not abrogate the state's self-imposed obligation to safeguard individual liberty, undertaken through ratification of the fourteenth amendment. Recognition of a state sovereign realm untouchable by the federal government by virtue of the tenth amendment does not mean the state sovereign realm is not limited by individual rights. The Nevada Supreme Court simply failed to read the last phrase of the tenth amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*."[134]

Conclusion

Recent state court cases indicate that tenth amendment problems are being confronted by courts which must attempt to define the federal-state relationship without any identifiable guidance from the Supreme Court. Supreme Court decisions do offer guidance, but through historical accident they were labelled with the eleventh amend-

132. 429 U.S. 190 (1976).

133. *Id.* at 206 (quoting P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING, CASES AND MATERIALS 258 (1975)).

134. U.S. CONST. amend. X (emphasis added).

ment rather than the tenth amendment. It would be an important first step toward principled decisionmaking in the field of federal-state relations to recognize that the eleventh amendment has served as a pseudonym for a great many tenth amendment cases.